Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

LEE BRENNEMAN,
Petitioner,

v.

MEDCENTRAL HEALTH SYSTEM,
Respondent.

Petition For A Writ of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the underlying court applied a legal test concerning unforeseeable leave under the FMLA that does not exist in the Sixth Circuit and thus fundamentally abrogated the Petitioner's rights under the FMLA.

Whether the underlying court erroneously determined that mixed questions of law and fact concerning notice issues under the FMLA are primarily questions of law when the Sixth Circuit had previously determined they are primarily questions of fact.

Whether the underlying court failed to properly apply the regulations concerning notice under the FMLA and the need for unforeseeable leave under the FMLA.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit opinion (App. B) is reported at *Lee Brenneman v. MedCentral Health System,* 366 F.3d 412 (6th Cir. 04/26/04).

The Memorandum of Opinion of the District Court of the Northern District of Ohio, Eastern Division in *Brenneman v. MedCentral Health System,* denying reconsideration is unreported and is set forth in the Appendix hereto (App. C).

The Memorandum of Opinion of the District Court of the Northern District of Ohio, Eastern Division in *Brenneman v. MedCentral Health System,* granting summary judgment is unreported and is set forth in the Appendix hereto (App. E).

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on April 26, 2004. The Court of Appeals entered an order denying a timely petition for en banc panel rehearing on August 6, 2004.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Family and Medical Leave Act of 1993 and the Code of Federal Regulations.

In Particular, for unforeseeable leave the Code of Federal Regulations, 29 C.F.R. Section 825.303(a) states in pertinent part:

> When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

STATEMENT OF THE CASE

Petitioner Brenneman commenced this action against his former employer, MedCentral Health System (hereinafter referred to as "Respondent"), under the FMLA, the ADA, and relevant state law. Respondent moved for summary judgment and the trial court granted summary judgment as to all of Petitioner's federal and state law claims with prejudice.

Petitioner alleges that his employer violated the Family and Medical Leave Act (FMLA) by failing to offer and provide him with FMLA leave which he had qualified for under law as a diabetic who suffers from hypoglycemic attacks as they never informed Petitioner that his diabetic episodes qualified as FMLA leave; that Respondent was on notice that Petitioner is a diabetic since his first day of employment, that Petitioner's doctor, Dr. Cynthia Dorsey, MD, timely notified Respondent of his last hypoglycemic episode prior to the final decision of termination, as well as Petitioner's wife; and, finally, that the underlying court applied a test to the Petitioner's case concerning unforeseeable FMLA leave that does not exist in the Sixth Circuit- all fundamentally abrogating Petitioner's rights under the law.

Petitioner began working for Respondent in 1973. Petitioner was diagnosed with diabetes mellitus in July, 1968, when he was thirteen (13) years old. When the Petitioner initially applied for the job he stated at that time that he suffered from diabetes mellitus on his employment

application form.

Respondent knew Petitioner had diabetes since his workers' compensation medical reports indicate his diabetic condition, which slows healing. (App. B-4) (App. E-4) Moreover, Petitioner had a discussion with the previous Assistant Director, George Brown explaining that one of his absences occurred because his blood sugar was "messed up." (App. B-31) (App. E-6)

During his career at Respondent, Petitioner was an experienced, competent employee as indicated by his Performance Evaluations and Performance Competency Assessments. Throughout the years, Petitioner's diabetes has become more severe, consequently he has been using an insulin pump since December 1998. (App. B-3)(App. E-3)

Despite the remedial measures Plaintiff has taken regarding his health, Petitioner occasionally experiences hypoglycemic episodes (App. B-3)(App. E-3), during which he experiences symptoms such as seizures, shock, lightheadedness, and a feeling of being "drunk." (App. B-3)(App. E-3) His general treating physician, Dr. Peter T. Roemer, MD, states that he was a difficult diabetic to control and that he would have limited control over his hypoglycemic episodes until adjustments were made in his insulin doses.

Throughout his employment, there have been occasions on which the Plaintiff has missed workdays or part of workdays due to his diabetes. However, Respondent unnecessarily accumulated termination points for Petitioner

under its initial attendance policy which "carried-over" to its modified attendance policy. This errant point "carry-over" of non-pointable events triggered Petitioner's wrongful termination under the new attendance policy through an accumulation of excessive, but erroneous, points. Further, many, if not all of Petitioner's accumulated points, would not have been assignable to Petitioner under Respondent's Attendance Policy and FMLA Policy, had Respondent provided FMLA leave as they were required to do by law.

Despite the fact that his supervisors and the personnel in the Human Resources Department knew that Petitioner had diabetes, the Petitioner was never advised that the absences due to his diabetes condition were covered under the Family and Medical Leave Act.(App. B-27)

On March 31, 2000, Petitioner was absent from work due to a hypoglycemic episode and a workers' compensation doctor's appointment- **both absences being non-pointable under the FMLA, and, thus, Respondent's attendance system.** (App. B- 4) This final absence caused his wrongful termination although Petitioner called the employer that day and informed it that he "wasn't doing well and...wouldn't be in today." (App. B-4, B-21, B-23)

On April 4, 2000, Petitioner was informed that he was being terminated at a meeting with his supervisors. (App. B-4, B-21) On April 5, 2000, Petitioner's wife informed the employer that Petitioner was absent due to a diabetic episode. (App. B-21, B-27) On April 6, 2000, Petitioner attended an

interview with Respondent and presented a note from Dr. Cynthia Dorsey dated April 5, 2000, stating that the absence was due to an extended episode of diabetes-related hypoglycemia. (App. B-21, B-22)(App. E-7, E-22) Respondent then finalized Petitioner's termination (App. B-5) since Respondent wrote Petitioner accumulated too many points under Respondent's absentee point system. Petitioner contends, *inter alia,* that had he known his diabetic episodes were FMLA qualifying events under the law he would not have been terminated.[1]

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1. Further, there are serious questions of material fact surrounding not only when and how Petitioner was terminated, what and when notice was given to Respondent, how sufficient the notice was under the law, and whether Petitioner was terminated for alleged misconduct and/or miscalculated points under the attendance system that will be discussed *infra*. (App. B-15 to B-38)

REASONS FOR GRANTING THE WRIT

I.

THE COURT BELOW HAS APPLIED A TEST TO THE PETITIONER'S CASE CONCERNING UNFORESEEABLE LEAVE THAT DOES NOT EXIST IN THE SIXTH CIRCUIT AND HAS THEREFORE FUNDAMENTALLY ABROGATED PETITIONER'S RIGHTS UNDER THE LAW.

In this particular case, the underlying court has established a new "test" in the Sixth Circuit concerning sufficient notice under the FMLA for unforeseeable leave and in applying this test for the first time in Petitioner's case has fundamentally abrogated the Petitioner's rights under the law.

Specifically, the underlying court has stated that the:

> critical test for substantively-sufficient notice is whether the information that the employee conveyed to the employer was reasonably adequate to apprise the employer of the employee's request to take leave for a serious health condition that rendered him unable to perform his job. *Brohm, 149 F.3d at 523*; *Cavin v. Honda of Am. Mfg., Inc., 346 F.3d 713, 725 (6th Cir. 2003)* (App. B-17)***As stated above, the critical test for substantively-sufficient notice is.... (App. B-36)

In particular, neither the case of *Brohm v. JH Properties, Inc.*, 149 F.3d 517 (6th Cir., 1998), nor the case of *Cavin* even mentions the term "substantively-sufficient." Furthermore, the word "substantively" does not appear in either opinion. *See Brohm and Cavin in their entirety.* By applying the standard of "substantively-sufficient" notice as a requirement upon the Petitioner, the underlying court placed an evidentiary burden, one not supported by the statute or its regulations, upon Petitioner that they have not placed upon other similarly situated Petitioners concerning unforeseeable leave under the FMLA in the Sixth Circuit, thereby fundamentally abrogating the Petitioner's rights under the law.

In *Brohm,* the portion of the opinion the underlying court cites also does not mention the "substantively-sufficient" test. On page 523, *Brohm* cites to *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 762 (5th Cir. 1995) in stating:

> the critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious heath condition. *Id. at 764; see 29 U.S.C. §2612(e)(2)*(requiring employees to give 30 days' notice for **foreseeable** treatment of serious heath conditions). (emphasis added)

The Petitioner's case is concerned strictly with unforeseeable leave. Thus, in Petitioner's case, the Sixth Circuit has assumed the Fifth Circuit's "sufficiency" test for foreseeable leave under the FMLA and has established a "substantively-sufficient" test for unforeseeable leave. Further, the FMLA makes no such distinction in tests between foreseeable and unforeseeable leave. *See 29 U.S.C. §2612(e).*[2]

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2. (e) Foreseeable leave. (1) Requirement of notice. In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable. (2) Duties of employee. In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) is foreseeable based on planned medical treatment, the employee--(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and (B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable. *29 U.S.C. §2612(e).*

Finally, the underlying court misapplied the sufficiency test for unforeseeable leave under *Cavin* in relation to the Petitioner's case. While the Sixth Circuit stated the correct holding of *Cavin* in Brenneman, they failed to describe all the facts of *Cavin* and their particular relation to Petitioner's case. (App. B-36) In *Cavin*, the Sixth Circuit found that plaintiff's notice to the security company that worked at the employer's facility was sufficient to place the employer on notice that the employee needed unforeseeable FMLA leave. *Cavin*, at 725. In this case, the employer was placed on notice when the Petitioner applied for employment and that he suffered from a serious medical condition (App. B-37), and, further, Petitioner's **treating physician worked at the Respondent hospital** where the Petitioner was employed. Somehow, the underlying court determined that notice to a third party on premises security company was sufficient notice for Cavin and is insufficient notice for Petitioner, who advised his doctor, a staff member.

Therefore, the underlying court has established a new "test" in the Sixth Circuit concerning substantively sufficient notice under the FMLA for unforeseeable leave and in applying this test for the first time in Petitioner's case has determined that not only must notice be given within two or three days of leave as a matter of law, but the notice must also be "substantively sufficient" as a matter of law. Thus, the Petitioner's description of feeling sick, his wife's notice, and his doctor's letter were substantively insufficient as a matter

of law according to the Sixth Circuit, which is contrary to statute and the regulations on unforeseeable leave.

II.

THE COURT BELOW HAS ERRONEOUSLY DETERMINED THAT NOTICE ISSUES UNDER THE FMLA ARE PRIMARILY QUESTIONS OF LAW AND NOT FACT.

The underlying court has erroneously determined that fact intensive issues in this case are unpersuasive to create genuine issues as a matter of law, and, thus, have fundamentally abrogated the Petitioner's rights.

The Sixth Circuit has "characterized the issue of adequate notice under the FMLA as involving 'primarily questions of fact...not questions of law.' *Williams v. Schuller Int'l., Inc.* 29 Fed.Appx 306 (6th Cir. 2002)" *Cavin v. Honda of Am. Mfg.*, 346 F.3d 713, 723 (6th Cir. 2003). Yet, the underlying court completely ignores the fact intensive disputes in this case that create genuine issues to be determined by a trier of fact and dismisses them from being heard as a matter of law.

First, the Sixth Circuit states that:

> Plaintiff's complaint alleges that defendant unlawfully interfered with plaintiff's exercise of his rights under the FMLA by counting

> various absences that he alleges were FMLA-qualifying-absences on February 16, 1996; [***14] February 9, 1999; and March 31, 2000-under its "no-fault" attendance policy and by subsequently terminating plaintiff pursuant to that policy. The district court granted summary judgment to defendant on plaintiff's FMLA claim on the ground that plaintiff, as a matter of law, failed to give defendant sufficient notice of a FMLA-qualifying reason for these alleged diabetes-related absences. (App. B-19)

In doing so, the circuit court relies on the opinion of the district court that the February 16, 1996 incident only refers to "intestinal flu" relating to Petitioner's absence; on the second date the Petitioner "only informed his co-workers generally that he was having problems with his insulin pump" and; that Petitioner did not mention his diabetes on April 4, 2000 when he met with his supervisors. (App. E-24 to E-25)

All these fact intensive disputes create genuine issues of material fact to be determined by a trier of fact under *Williams* and *Cavin.* When assuming the disputed facts in a plaintiff's favor, a reasonable trier of fact could determine that intestinal flu is associated with diabetes; that general information to co-workers in reference to problems with an insulin pump with this employer's knowledge (*See*

arguments, supra) is material, and; that a reasonable plaintiff may not mention his illness at his termination because: 1) he did not have the requisite knowledge that his diabetes was FMLA qualifying, 2) the employer failed to inquire further into the facts as the law requires by asking him if his diabetes was the reason for his absence, and, 3) Petitioner did not know he was being terminated until the end of the meeting. (App. B-26 to B-29) Moreover, the Sixth Circuit agreed that Petitioner "would habitually state only that he was "ill" or "not feeling well" when he was experiencing a diabetes-related illness." (App. B-23) Out-of-circuit courts have held that amount of information to be enough for a trier of fact (*See Byrne, Spangler, Norman, Weeden, McNeela, and Konipol, infra*). Even the Sixth Circuit has held a similar amount of information should be presented to a tier of fact (*See Miller, Phillips, and Russell Stover Candies, infra*).

The Sixth Circuit even stated:

> Plaintiff testified that Carol Blackstone, defendant's Benefits Manager, told plaintiff that he should try to have the FMLA cover the [intestinal flu] absence, and gave him an FMLA form [**34] for his doctor to fill out. Plaintiff further testified that he followed Blackstone's suggestion even though it confused him because he did not know that

the FMLA covered the flu. (App. B-31)

Thus, the Sixth Circuit acknowledges that the Petitioner did not know that his diabetes was covered by the FMLA.(App. B-27) Yet, the underlying court stated that as a matter of law Petitioner failed to give adequate notice of his diabetes to the employer. (App. B-19, B-22, B-37)

Finally, the Sixth Circuit admits the "information that plaintiff [**25] gave defendant-via his wife's statement to Engle [April 5] or Dr. Dorsey's note [April 6]-**may have been sufficient** to convey to defendant that plaintiff's March 31st absence was due to a serious health condition that rendered [***16] him unable to perform his job" (App. B-22), the court went on to state that as a matter of law Petitioner failed to give the notice "within the necessary time frame for unforeseeable leave." (App. B-22) This is in direct conflict with the court's statement that on "April 6, 2000...Defendant, nevertheless, finalized plaintiff's termination." (App. B-5) Thus, it is a definitive question of material fact, even to the Sixth Circuit, whether the Petitioner was terminated on April 4, 2000, or April 6, 2000, with the requisite notice being given to the employer on April 5, 2000, by Petitioner's wife, or on April 6, 2000, by Petitioner in the note from Dr. Dorsey, dated April 5, 2000.

Therefore, the underlying court has erroneously determined that fact intensive issues in this case are unpersuasive to create genuine issues as a matter of law.

III.

THE COURT BELOW FAILED TO PROPERLY APPLY THE REGULATIONS CONCERNING NOTICE AND THE NEED FOR UNFORESEEABLE LEAVE UNDER THE FMLA.

A. The underlying court failed to apply the properly stated rule of law in this case.

The underlying court failed to apply the properly stated rule of law in this case and has severely prejudiced the Petitioner's rights. The FMLA regulations place the responsibility on the employer to **insure** that employees apply for FMLA leave whenever it is appropriate, even without the employee's initiative. *29 C.F.R. Sections 825.301(a) and (c) and 825.303(b).*

Specifically, the Family and Medical Leave Act of 1993, under Subpart C- "HOW DO **EMPLOYEES LEARN** OF THEIR FMLA RIGHTS AND OBLIGATIONS, AND WHAT CAN AN EMPLOYER REQUIRE OF AN EMPLOYEE? WHAT OTHER **NOTICES TO EMPLOYEES ARE REQUIRED OF EMPLOYERS** UNDER THE FMLA?" Section 825.301(a)(2)(b)(1) states that:

> The employer shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these

> obligations. The written notice must be provided to the employee in a language in which the employee is literate (*see Section 825.300(c)*). Such specific notice must include, as appropriate: (ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (*see Section 825.305*).

In addition, Section 825.301(c) states:

> Except as provided in this subparagraph, the written notice required by paragraph (b) (and by subparagraph (a)(2) where applicable) must be provided to the employee no less than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period).

Thus, the FMLA regulations require employers to issue two forms of notice to employees: first, a generalized notice posted at the employer's premises under 29 U.S.C. Section 2619(a), which is not applicable to this matter, and; second, a customized notice of FMLA rights and procedures issued to an employee who indicates a need to take leave for an FMLA-qualifying purpose under 29 C.F.R. Section 825.301 (a) and (c) and 825.303(b), which is directly relevant to this appeal. *See Knussman v. Maryland* (D.C. Md.

1998), 16 F.Supp.2d 601.

Here, the underlying court ignored the fact that the employer failed in their responsibility to insure that the Petitioner applied for FMLA leave when it was appropriate, even without the Petitioner's initiative. **The Petitioner was to be given specific notice from the employer for all of his absences** to see if they qualified for FMLA coverage. Thus, it is a question of fact whether Petitioner's conduct meets the FMLA requirements and whether the Petitioner was denied his FMLA rights as a result of the lack of specific notice. *See DeCesare v. Niles City School Dist. Bd. of Ed.* (11th Dist., 2003), 154 Ohio App.3d 644, 798 N.E.2d 655.[3] The underlying court noted that Petitioner did not need to wait to obtain the letter from the doctor to apply for FMLA. (App. B-21, B-26) Under the regulations, the employer should have provided him with specific notice and the medical form the minute Engle heard of the

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3. In *DeCesare,* the court found employer "satisfied the general posting requirement, it did not satisfy the customized posting requirement[]" where plaintiff requested a FMLA qualifying leave, "she was entitled to notice so that she could explore her options, including applying for leave under FMLA." *DeCesare* at 647. Although defendant contended that plaintiff did not qualify for FMLA leave, "this fact did not relieve the Board of its duty to discuss the FMLA with DeCesare so that she was aware of her options." *Id.* Further, the court found that "the Board did not notify DeCesare of her rights under the FMLA, nor did DeCesare specifically request or apply for leave under the Act. This issue needs to be decided by a trier of fact." *Id.* at 648.

diabetes related qualifying absence and Petitioner's wife's request. (App. B-21 to B-22, B-27)

Further, while the employer may have issued informal notices detailing the FMLA to its employees, the regulations require that those notices include language referring to the consequences of failing to comply with procedure. For example, 29 C.F.R. Section 825.301(a)(2)(b)(1) mandates that the written notice issued by the employer detail "the specific expectations and obligations of the employee and **[explain] any consequences of a failure to meet these obligations[.]"** Further, the employer's written notice must include, as appropriate "any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so...." *29 C.F.R. Section 825.301(a)(2)(b)(1)(ii).* (emphasis added)

The underlying court points out that "the record makes clear and as [plaintiff] acknowledged in his deposition, plaintiff, over the course of his employment, received several informational notices from defendant specifying that the FMLA may cover diabetes as a chronic health condition." (App. B-27) However, the notices are arguably defective as a matter of law as the notice failed to adequately inform employees of their FMLA rights and obligations and are silent as to any consequences for an employee's failure to meet his/her obligations under the FMLA, like notice, and for failure to meet his/her medical certification requirements under the FMLA.

It is appropriate that the employer articulate in writing the consequences any employee, including Petitioner, would face in failing to meet their obligations, like notice and medical certification requirements under the FMLA In the case of the February 16, 1996 intestinal flu incident, the Petitioner qualified under 29 C.F.R. Section 825.114(b) with 3 days of absence, bed rest, and a visit to the doctor, yet was improperly denied leave. The employer's FMLA Policy was silent as to the consequences of Plaintiff's failure to qualify for leave.

In addition, it is incumbent upon this employer to adequately appraise the employee of any penalty or consequences with specific notice enough that any reasonable employee may understand their rights and obligations under the FMLA so as not to potentially lose their rights under law. Thus, without consultation and specific individualized notice of rights and responsibilities, the employer abrogated Petitioner's rights as they have failed to provide the Petitioner with specific notice as mandated by the FMLA.

Further, there is a genuine question of material fact as to whether the employer's specific Notice form, or some other form, was issued to and received by Petitioner in 1993, 1994, 1997 or anytime after those years, and whether Petitioner was given his Notice no less than the first time in each six-month period that an employee gives notice of the need for FMLA leave. *29 C.F.R. §825.301(c).*

Moreover, the regulations require a more individualized approach by the employer upon an employee's nebulous request for leave due to an FMLA-qualifying

purpose. *29 C.F.R. §825.303(b)* ('The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional information through informal means.") The employer's informational Notice alone is insufficient to meet the FMLA regulations as the employer, faced with the allegedly unclear notice, was obligated to obtain additional information from Petitioner concerning each of his FMLA leave qualifying events, i.e., his February 9, 1999 absence due to "problems with his diabetes" (App. B-23, B-30, B-35 to B-37), and the date of his last FMLA qualifying absence, March 31, 2000.

Thus, the underlying court failed to apply the properly stated rule of law in this case as there are genuine questions of fact as to whether the employer met the FMLA's specific notice requirement, conducted inquiries, and whether through the employer's actions, Petitioner was denied his rights under the FMLA.

B. Under the rules of statutory construction, the underlying court should not narrow the notice provisions of 29 C.F.R. §825.303(a).

The Sixth Circuit court in applying the underlying statute, the Family and Medical Leave Act (29 U.S.C. §2601, *et. seq.* or "FMLA") and its Code of Federal Regulations corollary (29 C.F.R. 825.303(a)), failed to properly analyze

the regulation designed for the protection of an employees' need for medical leave when that leave is unforeseeable. (App. B-20 to B-29) Under the regulation, employees like Petitioner "should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case" and are expected to give notice to the employer "within no more than one or two working days...except in extraordinary circumstances where such notice is not feasible." *29 C.F.R. 825.303(a)* (App. B-17 to B- 18)

The FMLA notice regulation specifically uses the word "should" not "shall," thus contemplating that an employee would be given some latitude in conveying his need for leave and, further, modified the notice provision by stating "as soon as practicable under the facts and circumstances of the case[,]" thereby creating an individualized fact-based determination of what is sufficient notice. *29 C.F.R. Section 825.303(a).*[4]

Further, the regulation uses the word "expected" that notice will be provided "within no more than one or two working days **of learning of the need for leave;...**" *29 C.F.R.*

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4. In *Arban v. West Publishing Corp.*, 345 F.3d 390 (6th Cir. 2003), the court discussed the term "shall" as defined in both the FMLA and Fair Labor Standards Act in the context of remedial provisions and determined its precise application in that context.

Section 825.303(a).(emphasis added) Therefore, the underlying court's declaration that as a matter of law Petitioner failed to provide notice within one or two working days flies against the rules of statutory construction. (App. B-24) By stating the necessary time frame for proper notice is one or two days as a matter of law the underlying court completely ignores the individualized analysis required by the terms "facts and circumstances of the case" and "learning of the need for leave." *29 C.F.R. Section 825.303(a).* Had the Department of Labor intended one or two working days to serve as the appropriate notice, it would have written clearly that an employee shall provide notice to an employer within one or two working days for unforeseeable leave.

Moreover, the one or two day notice language is further modified by the phrase "when a [plaintiff] learns of the need for leave." *Id.* The underlying court conceded that it was Dr. Dorsey and Bruce Engle in the exit interview who educated Petitioner that his diabetes should have been covered under FMLA. (App. B-5) Thus, Petitioner did not learn of FMLA intermittent leave covering diabetes until Dorsey and Engle advised him and his wife of the coverage. Further, the underlying court indicated that no extraordinary circumstances existed to render it unfeasible for Petitioner to have given notice to the employer within two working days even though the court acknowledged the employer's failure to inform Petitioner that the FMLA covered diabetes and permitted intermittent leave for a medical condition such as

his. (App. B-26 to B-27) Extraordinary circumstances exist due to the fact that the Petitioner never knew his diabetic episodes were covered under the FMLA.

In addition, by holding as a matter of law that necessary notice should be given within one or two working days, the underlying court eviscerates the end of the regulation which reads "except in extraordinary circumstances in which notice is not feasible." *Id.* The phrase "extraordinary circumstances" was to extend the term within one or two working days of when the employer learns of the need for FMLA, not to cut the notice further. Again, if the Department of Labor intended a flat out rule of one or two working days, it would have written that notice "shall be provided" to the employer within one or two working days, and not conditioned the rule with the phrases "expected" or of when "the employee learns of the need for leave" or placed a comma after the word "leave" before the phrase "extraordinary circumstances." *Id.*

Therefore, the underlying court has attempted to narrow the notice provisions of 29 C.F.R. §825.303(a), and, as such, has denied the Petitioner his rights under the FMLA.

C. The underlying court completely ignored the facts and circumstances concerning unforeseeable leave and stated notice involves primarily questions of law when FMLA notice cases are generally so fact intensive as to be considered primarily questions of fact.

The Sixth Circuit court completely ignored the mixed questions of fact and law in applying the underlying statute. Specifically, the Sixth Circuit has stated that:

> "When discussing notice requirements in other statutory contexts, this court has said that 'adequacy of notice is consistently regarded as a finding of mixed fact and law. *Burkart v. Post-Browning, Inc.*, 859 F.2d 1245, 1249 (6th Cir. 1988)...In a recent unpublished opinion, however, a panel of this court characterized the issue of adequate notice under the FMLA as involving 'primarily questions of fact...not questions of law.' *Williams v. Schuller Int'l., Inc.* 29 Fed.Appx 306 (6th Cir. 2002)" *Cavin v. Honda of Am. Mfg.*, 346 F.3d 713, 723 (6th Cir. 2003).

An employee is not required to assert his rights under the FMLA. *See 29 C.F.R. Section 825.303(b); George v.*

Associated Stationers, 932 F.Supp. 1012, 1016 (N.D. Ohio 1996); *See also 29 U.S.C. § 2601, et seq.*[5] "[A]n employee need not invoke the FMLA by name in order to put an employer on notice that the Act may have relevance to the employee's absence from work." *Thorson v. Gemini*, 205 F.3d 370, 381 (8th Cir. 2000). Moreover, "[w]hat is practicable, both in terms of the timing of the notice and its content, will depend on the facts and circumstances of each individual case." *Manuel v. Westlake Polymers Corp., 66 F.3d 758, 764 (5th Cir. 1995).* Once an employee gives notice of a need for leave that may be FMLA- qualified, it is the employer's duty to inquire further to determine whether the FMLA applies. *Price v. City of Fort Wayne, 117 F.3d 1022, 1026 (7th Cir. 1997).*

There are numerous cases where significant facts have been recognized by courts precluding summary judgment in jurisdictions outside of the purview of the Sixth Circuit. A few notable cases include: *Byrne v. Avon Products, Inc.*, 328 F.3d 379 (7th Cir. 2003)(employee with four year record of strong performance placed employer on notice of his need for FMLA leave based only upon unusual behavior); *Spangler v.*

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5. Congress authorized the Secretary of Labor to promulgate regulations necessary to carry out the FMLA. *See 29 U.S.C. §2654.* The Sixth Circuit has held that these regulations are to be given "controlling weight." *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 935 (6th Cir. 2000).

Federal Home Loan Bank of Des Moines, 278 F.3d 847, 852-3 (8th Cir. 2002)(even where an employee's notice for missing work was "untimely, or was unclear and otherwise inappropriate, or was even in violation of the [employer's] reasonable notice policy[,]" when the employer knew the employee suffered from depression and knew she needed leave in the past for depression, the court found that a genuine issue of material fact existed as to appropriate notice under the circumstances); *Norman v. Southern Guaranty Ins. Co.*, 191 F.Supp. 1321, 1333 (M.D. Ala. 2002)(the court found that "knowledge of some members of the supervisory staff of Southern Guaranty of Norman's bouts with depression, creates a jury-triable issue as to the FMLA claim."); *Weeden v. Sears Roebuck & Company*, 1999 U.S.Dist. LEXIS 22495 (N.H. Dist., 1999)(dispute whether plaintiff was terminated after phoning work May 14 stating he felt sick, when he contacted manager May 19 or 20, or when he faxed in doctor's note on May 21 precluded summary judgment on FMLA notice); *McNeela v. United Air Lines, Inc.*, 1999 U.S. Dist. LEXIS 20042 (N.D. Ill., 1999)(summary judgment precluded on FMLA notice where employer knew plaintiff were involved in accident and conflicting statements from plaintiff and defendant as to whether they spoke over phone from hospital), and; *Konipol v. Restaurant Associates*, 2002 U.S. Dist. LEXIS 22439 (S.D.N.Y., 2002)(summary judgment precluded on FMLA notice where employer knew plaintiff had serious health condition and simply stated she would not

be in due to being ill, as well as questions of fact as to receipt of medical note).

In addition, there are cases within the Sixth Circuit that offer conflicting results based upon similar law and fact, including; *Miller v. GB Sales & Service, Inc.*, 275 F.Supp.2d 823, 829 (E.D.S.D. Mich., 2003)(court stated that, "[w]hat GB fails to understand, however, is that its knowledge of Miller's serious health conditions [Diabetes Mellitus and Depression] placed the burden on it to inquire further whenever Miller called in sick for medical reasons to determine if those reasons were FMLA qualifying.")[6]; *Phillips v. Leroy-Somer North America, et al.*, 2003 U.S. Dist. LEXIS 5334 (W.D. Tenn., 2003)(material issues precluding summary judgment where evidence of absenteeism, misconduct, and FMLA leave in dispute); *Taylor v. Invacare*, 64 Fed.Appx. 516, 519 n3, 2003 U.S. App. LEXIS 10318 (6th Cir. 2003)(employee returned to work after a brief hospital stay with a doctor's note that placed employer on notice of need for FMLA leave), and; *George v. Russell Stover Candies, Inc.*, 2004 U.S. App. LEXIS 15010 (6th Cir., 2004)(the court found that the defendants were improperly granted summary judgment on claims that they denied the employee's request

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6. In the case on appeal, Petitioner suffers from Diabetes Mellitus which the Respondent **Hospital**, Petitioner's **treating hospital**, knew he was afflicted with since he first applied for work at the hospital on or about 1973.

for FMLA leave for July and August of 1997, as there were fact issues as to whether the employee had requested pregnancy-related leave in August when defendants alleged that plaintiff had not informed them she was pregnant until October).

The Petitioner contends that he gave proper notice to the employer three times: first, when he telephoned the employer on March 31, 2000 (date of illness) (App. B-4, B-21, B-26 to B-27); second when his wife notified the employer personally on April 5, 2000 (App. B-21, B-27), and; third when the employer received Dr. Dorsey's letter on April 6, 2000. (App. B-5, B-21) Further, the Petitioner contends that he did not notify the employer at the April 4, 2000 meeting of his diabetes absence because he was not asked why he had been absent on March 31, 2000. The underlying courts both completely ignored the Petitioner's wife's statement to the employer and the Petitioner's testimony that he had not been asked at the April 4, 2000, meeting why he had been absent on March 31, 2000.

Moreover, the underlying court recognized that the Petitioner was not terminated until April 6, 2000, **after** presenting a note from his treating physician that his absence was due to an FMLA qualifying event. (App. B-5) Finally, the underlying court indicated that no extraordinary circumstances existed to render it unfeasible for Petitioner to have given notice to the employer within two working days (B-25 to B-26) even though the court acknowledged the

employer's failure to inform Petitioner that the FMLA covered diabetes and permitted intermittent leave for a medical condition such as his. (App. B-27)

Thus, the underlying court completely ignored the mixed questions of fact and law concerning unforeseeable leave and their application to the regulation that created genuine issues precluding summary judgment, and, as such, has denied the Petitioner his rights under the FMLA.

CONCLUSION

For all of the foregoing reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Sixth Circuit, and, ultimately, to vacate and reverse the order below and remand the matter to the district court for trial. Without such an order, employees subject to the unforeseeable leave provisions of the FMLA will be subject to a narrowed interpretation of the statute by the underlying court; they will be subject to notice provisions being primarily questions of law; and, they will be subject to a test that does not exist in the underlying court.

Respectfully submitted,

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